

INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

OBSERVATIONS FOUND DURING THE INSPECTION OF INSOLVENCY PROFESSIONALS

Background

In terms of section 208(2)(c) of Insolvency and Bankruptcy Code Clause 18 (e) of Bye-Law VIII of IBBI (Model Bye-Laws & Governing Board of Insolvency Professional Agencies) Regulations, 2016 read with Bye-Laws of Insolvency Professionals Agencies ("IPAs") and Monitoring Policy of IPAs provides for evaluation of the performance of the members through Desktop Surveil and On-Site Visits which includes inspection of the Insolvency Professionals ("IPs").

The mechanism for inspection of IPs has been provided with a view to ascertain whether the conduct of IPs is in overall interest of the ecosystem and to ensure that the position of trust held by IPs is not abused by them and in cases where it is, to ensure appropriate action is taken. The purpose of inspection is to gather sufficient relevant information on the conduct and performance of the IPs.

DURING THE INSPECTIONS CONDUCTED BY THE IIIPI SOME OBSERVATIONS WERE FOUND WHICH ARE GIVEN BELOW ALONG WITH THE SUGGESTED BEST PRACTICES IN THAT RESPECT:

1. PUBLIC ANNOUNCEMENT

Stipulation:

Regulation 6 of IBBI (CIRP) Regulations, 2016, requires that Public Announcement be made in a national and regional newspaper

Observation:

One of the common error observed in most of the cases is that public announcement made in the regional newspaper, is in English language, which should be in the regional language.

Proposed Best Practice:

The purpose of publishing public announcement in 2 newspapers (English & regional language) is to reach majority of stakeholders even those who do not understand English language. Through publishing of public announcement in English language in regional newspaper is invalidating the intent of the regulations which should not be followed.

2. ISSUES RELATING TO CLAIMS

Stipulation:

Regulation 13 of the IBBI (CIRP) Regulations, 2016

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Observation:

List of claimants is not maintained properly. Many important fields like date of receipt of claim, type of claim, date of verification of claim, security interest (if any) is missing.

Proposed Best Practice:

IP should update list of claimants on regular basis as and when any claim is received and should duly record date of acceptance and verification of claim, reason of rejection of claim, type of claimant, form pursuant to which claim is received, mode of receipt of claim, security interest (if any) and any other important field (if any).

In case of claimant queries, these may be addressed as soon as possible. In case the information is displayed on the Web-Site at least templated response may be provided by IP.

3. MINUTES OF THE MEETING OF COC

Stipulation:

Regulation 18 to 26 of IBBI (CIRP) Regulations, 2016

Observation:

- (a) Notice enclosing agenda do not provide segregation of the item to be voted upon in the CoC meeting
- (b) option to participate via video conferencing or other audio/visual means to be given in the Notice.
- (c) Absence of attendance sheet or incomplete details.
- (d) Non circulation of minutes of CoC meeting within 48 hours from the conclusion of meeting.
- (e) Minutes of CoC meeting do not specify the mode of participation of CoC members.
- (f) Since decisions under CIRP are based on commercial wisdom of the COC, these decisions should be well reasoned which should be detailed and recorded in the minutes. Random or adhoc decisions or or decisions without adequate justification should be avoided.

Best Practice:

- (a) Notice of CoC meeting enclosing agenda should separately record the items to be discussed and items to be voted upon in the meeting for better understanding as a whole.
- (b) Attendance sheet should be complete in all respect and signing should be ensured within the meeting itself.
- (c) IP should circulate the draft minutes of the concluded meeting within 48 hours for inviting comments (if any) of CoC members on the draft minutes thereby specifying the days within which comments have to be provided.

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- (d) Minutes shall specifically disclose the particulars of the participants who attended the meeting in person, through video conferencing or other audio and visual means.
- (e) IRP/RP should give his/her independent opinion on each matter voted, based on the facts of the matter voted on. This should form part of the minutes/records of the meeting. This will ensure that the justification for the decision is available at a later date, along with related records, for analysis/ verification.

4. CONSENT TO ACT AS A RESOLUTION PROFESSIONAL

Stipulation:

Regulation 31(IA) of the IBBI (CIRP) Regulations,2016

Observation:

In respect of Assignments where Interim Resolution Professional is continuing as Resolution Professional the IRP is not providing consent to act as the same in the manner provided in the Code.

Best Practice:

Interim Resolution Professional before continuing as Resolution Professional should ensure to submit consent in Form AA as provided in respective regulations.

5. NON MAINTENANCE OF WEBSITE DURING CIRP

Stipulation:

Regulation 6(2)(b)(ii), 13(2)(c), 36A(2)(ii) of IBBI (CIRP) Regulations, 2016 and Clause 21 of Code of Conduct of IBBI (IP) Regulations,2016

Observation:

A well maintained web-site is a vital support for communication between IRP/RP and claimants, particularly where their number is large. It adds to transparency, prompt delivery of information and reduction in complaints..

Best Practice:

IRP/RP may give proper attention to this aspect of CIRP driven communication. Corporate debtors who do not have the website, may engage some agency who can provide temporary website to host details of CIRP. IP must ensure that confidentiality of the information relating to the insolvency resolution process is maintained at all times.

6. APPOINTMENT OF REGISTERED VALUERS

Stipulation:

Regulation 27 of IBBI (CIRP) Regulations, 2016

Observation:

IPs are appointing registered valuers duly registered with IBBI. However, engagement letters are issued in the name of firms/companies which are not IBBI Registered Valuer Entity.

Best Practice:

IPs should ensure that the engagement letter (in writing) is issued to either IBBI Registered Valuer/Registered Valuers Entity specifying their name, address, IBBI registration number, their scope of work, fees and timeline within which report has to be provided.

7. APPOINTMENT OF OTHER PROFESSIONALS FOR ASSISTANCE

Stipulation:

Section 20(2)(a) of the Code read with Regulation 33(4) of IBBI (CIRP) Regulations, 2016 and Code of Conduct provided under IBBI (IP) Regulations, 2016

Observation:

- (a) Non-issuance of a defined engagement letter to the appointed professionals and also non-obtention of declaration of independence from the appointed professional.
- (b) Incomplete recording in minutes with regard to the engagement of other professionals.
- (c) Unavailability of invoices on part of services obtained from the appointed professionals

Best Practice:

(a) Before engaging any professional, IP should obtain declaration of independence from the concerned professional in terms of IBBI Circular dated 16th January 2018.

(b) Engagement letter (in writing) should be issued to every appointed professional clearly mentioning the scope of work, fees, time period within which assignment is to be completed and maintenance of confidentiality with regard to the information shared and engagement should be properly recorded in minutes of CoC meeting.

(c) IP should make payment to professional only after receipt of invoice with regard to the services.

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8. FORENSIC AUDIT

Stipulation:

Transactions specifically related to Sections 43 to 46 and Section 66 of the Insolvency and Bankruptcy Code, 2016 are to be looked at by the IP and a report submitted to the AA, if the apprehension in this respect is material. The IP may be assisted by forensic auditor, if necessary.

Observation:

Considering the fact that the IBC contains provisions on avoidance transactions, fraudulent or wrongful trading, and protecting business value during the insolvency period, IPs would be expected to unearth and report transactions of questionable nature. While IPs may engage the services of suitable professionals for the purpose, the report presented to the AA needs to be conclusive and "owned" by the IP. Often this is not the case.

Best Practice:

Where the IP uncovers/suspects Preferential, Undervalued, Fraudulent or Extortionate transactions, Forensic Audit is mandated. A Report comprehensively covering the following aspects, among other relevant areas, should be submitted to the AA under the signatures of the IP:

- i. Nature of avoidance transaction
- ii. Defining the criteria for assessment: Relevance, Materiality, Authenticity
- iii. Record of process for analyzing documents & accounting database
- iv. Itemised list of evidence supporting the conclusion
- v. Estimated amount involved, with justification
- vi. Rationale for arriving at the decision, etc.

It may be noted that the IP needs to take the responsibility for the prima facie correctness of the Forensic Audit report submitted to AA and the conclusions arrived therein.

9. SHARING OF NOTICE OF COC MEETING VIA E-MAIL

Stipulation:

Regulation 20 of the IBBI (CIRP) Regulations, 2016.

Observation:

Subject line of sharing notice and agenda of CoC meeting not in accordance with the format specified in CIRP regulations.

Best Practice:

Subject line in e-mail sharing notice of CoC meeting shall state the name of the corporate debtor, the place (if any), the time and the date on which the meeting is scheduled.

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10. DECLARATION OF CONFIDENTIALITY FROM COC MEMBERS

Stipulation:

Regulation 27 and 36 of IBBI (CIRP) Regulations,2016.

Observation:

Non obtaining of declaration of confidentiality from CoC members while sharing Information Memorandum and fair and liquidation value of the corporate debtor.

Best Practice:

RP shall mandatorily obtain declaration of confidentiality from the CoC members before sharing Information Memorandum and fair and liquidation value of the corporate debtor.

11. COMPLIANCE OF COMPANIES ACT, 2013 DURING INSOLVENCY PROCESS

Stipulation:

Section 17(2)(e) of the Code.

Observation:

In many cases the MCA compliances i.e. filing of financial statements, annual returns, other ROC related forms have not been complied by IP.

Best Practice:

The Insolvency professional shall make every endeavour to keep the company going concern with all possible compliances.

12. EXORBITANT FEES CHARGED BY THE AUTHORISED REPRESENTATIVE (AR)

Stipulation:

Regulation 16 A of the IBBI (CIRP) Regulations,2016.

Observation:

Irrespective of specific fees stipulated in the regulations for AR, the AR was charging much higher fees which even got the approval of the resolution professional.

AR are allowing home buyers to attend CoC Meetings.

Best Practice:

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IPs acting as AR should charge fees in accordance with the amount mentioned in specified CIRP Regulation and AR role is only limited to attend and vote meeting of committee of creditors on behalf of class of creditors.

13. COMPLIANCE WITH TIMELINES

Stipulation:

Regulation 40 A of IBBI (CIRP) Regulations,2016 and Regulation 47 of IBBI (Liquidation Process) Regulations,2016.

Observation:

In many cases IPs do not adhere with the timelines prescribed under the Code and regulations. For example: circulation of notices, minutes, Invitation of Expression of interest, determination of fraudulent and other transactions etc. are generally being delayed by the IPs.

Best Practice:

An IP must strictly adhere to the timelines prescribed under the provisions of the Code and the regulations made thereunder. He must act with utmost care and caution and must not be negligent while performing his duties during insolvency resolution or liquidation, as the case may be.

14. OUTSOURCING OF DUTIES

Stipulation:

Section 18 and 25 of the Code read with IBBI Circular No. IP/003/2018 dated 3rd January 2018.

Observation:

It has been observed the scope specified in the engagement letter issued to the professional is regarding the assistance to be provided to IP with regard to the core duties and responsibilities, performance of which is the sole responsibility of IP.

Best Practice:

IP shall not outsource any of his core duties and responsibilities otherwise the essence of the Code and importance of the profession of an IP will be defeated.

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15. REPORTING REQUIREMENTS OF IPS UNDER CODE, REGULATIONS AND CIRCULARS

Stipulation:

Section 208 (2)(d) of the Code read with IBBI Circular dated 16th January 2018, 12th June 2018 and 14th August 2019 and Monitoring Policy of IPA

Observation:

IPs are not complying with the reporting compliances of IPAs/IBBI with accuracy and within defined timelines. Lapse of information has been observed while filing disclosures and CIRP forms on IBBI Portal.

Best Practice:

Before submitting any information to IBBI/IPA, IPs should cross check the information with the supporting documents as many information provided is available for public view on IBBI/IPA website. Providing wrong information may pose difficulty for IPs. IPs should have a mechanism in place to periodically check the status of compliances.

16. APPOINTMENT OF COMMON PROFESSIONALS BY IPS FOR THEIR MULTIPLE ASSIGNMENTS

Stipulations:

Clause 3 and 3A of Code of Conduct specified under IBBI (IP) Regulations, 2016.

Observation:

IPs have appointed common professionals in most of their assignments which may depicts presence of biasness, conflict of interest, coercion or undue influence of any party, whether connected to the insolvency proceedings or not.

Best Practice:

- a) IP should appoint any professional after duly inviting quotations from multiple professional and then analysing scope of work with the proposed fee.
- b) IP must ensure that the professionals appointed should not have any conflict of interest. Further, if common professionals are being appointed in every case it will lead to some indirect sort of connection/undue influence.

17. HANDOVER OF CHARGE BY IRP TO RP

Stipulation:

Section 23(3) of the Code.

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Observation:

In many cases handover of records to the succeeding IRP/RP was not in proper manner. The insolvency professional did not provide the complete records of the CIRP which hampers the work of succeeding IP and which is against the code of conduct.

Best Practice:

It is the duty of the IRP/RP to handover the complete records, details, information to the succeeding resolution professional.

18. MENTIONING OF VOTING SHARE IN COC MINUTES

Stipulation:

Regulation 23(3)(c) of the IBBI (CIRP) Regulations, 2016

Observation:

IPs are not indicating the voting share of CoC members in the minutes of CoC meeting and also against the agenda item which requires voting on part of CoC members. IPs are mentioning only pass/fail against the resolution.

Best Practice:

It is recommended to include list of creditors along with their voting share and change in list of creditors/voting shares (if any) in the minutes of CoC meeting. IP should mention the percentage of voting by which any resolution stands pass/fail.

19. VARIATION WITH REGISTERED ADDRESS

Stipulation:

IBBI Circular No. IP/001/2018 dated 03rd January, 2018.

Observation:

The inspection of insolvency professionals is required to be conducted on his registered address. However, the books and records relating to assignments are kept at a different address. Therefore, the inspection has to be conducted at an address other than registered address.

Best Practice:

It is advisable that IPs must operate from their registered address only.

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20. DATA STORAGE MANAGEMENT

Stipulation:

Regulation 39A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 & Regulation 6 (2) of IBBI (Liquidation Process) Regulations, 2016.

Observation:

Constraint of space in the office, no separate space for Data room is being maintained.

Best Practice:

The interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies. The liquidator shall maintain the registers and books, as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor. IPs must have proper storage space for making data rooms and ensure that such room is accessible only by the authorized persons.

21. SYSTEMS & PROCESSES

Stipulation:

No legal provision

Observation:

While Inspection it has been observed that, IPs don't adopt Systems & Process for their activities. As a result of which they cannot work in efficient manner.

Best Practice:

For effective governance IPs are required to implement effective systems & processes for various activities some of them are as follow:

- (a) Processes for drafting of documents.
- (b) Systems & Processes for meeting of CoC.
- (c) Processes for storage, retrieval and dissemination of documents.
- (d) Processes for effective infrastructure and human resource facilities
- (e) Processes for compliance reminder.

22. MENTIONING OF VOTING SHARE OF COC MEMBERS IN THE REPORT CERTIFYING CONSTITUTION OF COC

Stipulation:

As per the provisions of Code and Regulation.

Observation:

While Inspection it has been observed that, most of the IPs does not mention voting share of COC members in the report certifying constitution of COC.

Best Practice:

The voting share of COC members should form part of the report certifying constitution of COC being submitted to NCLT.
